IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1386

COUNTRY-WIDE INSURANCE COMPANY,

Appellant,

against

THOMAS A. HARNETT, Superintendent of Insurance of the State of New York,

Appellee.

On Appeal from the United States District Court for the Southern District of New York

JURISDICTIONAL STATEMENT

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April, 1977

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JURISDICTIONAL STATEMENT

Appellant appeals from a judgment of a three-judge United States District Court for the Southern District of New York, dated and filed on February 14, 1977, dismissing the amended complaint.[1]

This Statement is submitted in order to demonstrate that the Supreme Court of the United States has jurisdiction of the appeal and that substantial constitutional questions are presented.

1. Although neither the court's opinion nor the judgment so indicate, it appears that the amended complaint was dismissed for failure to state a claim, pursuant to Appellee's Rule 12(b)(6) motion.

Opinion Below

The opinion of the three-judge United States District Court for the Southern District of New York is not yet reported, but is annexed hereto as Appendix C.

Judgment and Notice of Appeal

The judgment of the three-judge court is annexed hereto as Appendix D; no re-hearing was sought or had. The notice of appeal is annexed hereto as Appendix E.

Jurisdiction

This action was brought pursuant to 28 U.S.C. §§1331 and 1343.

The opinion of the three-judge District Court is dated February 8, 1977. The judgment is dated and was filed on February 14, 1977. Notice of Appeal to this Court, dated February 28, 1977, was filed in the United States District Court for the Southern District of New York on March 1, 1977.

The jurisdiction of this Court to review in this case by direct appeal is conferred by 28 U.S.C. §1253.

Constitutional Provisions Involved

Art. I, Section 10: No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."

Amendment XIV, Section 1: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes Involved

Challenged here as being unconstitutional under the Contract Clause are Sections 7 and 11 of New York's ". . . Act to Amend the Insurance Law, the Workmen's Compensation Law and the Vehicle and Traffic Law, In Relation to Establishing A Comprehensive Automobile Insurance Reparation System" (L. 1973, c. 13, hereafter referred to as the "Act"), and Section 167-a (6) of New York's Insurance Law (read in conjunction with Section 675(1) of Article XVIII of New York's Insurance Law, and L. 1976, c. 348. In combination, these No-Fault statutes accomplish two things:

(1) they automatically extend for at least 4 years the 1 year time term of automobile insurance policies which otherwise would originally have expired between August 1, 1973 and July 31, 1974, and

(2) they automatically create a new kind of coverage and increase the insurer's potential financial liability by a sum up to $50,000 for each person able to make a claim for the payment of the new "first party benefits."

Also challenged here as being unconstitutional under the Fourteenth Amendment are Sections 675(1) and 675(2) of Article XVIII of New York's Insurance Law. These

sections allow a person claiming first party benefits from an insurer to compel the insurer to participate in binding arbitration of every disputed issue between them, thus completely cutting the insurer off from a judicial determination on every issue arbitrated.

Questions Presented

I.

Do Sections 7 and 11 of the Act, Section 167-a(6) of the Insurance Law (read in conjunction with Section 675(1) of Article XVIII), and Chapter 348 of the Laws of 1976 of the State of New York—extending for at least four years the time term of automobile insurance policies which otherwise would have expired originally between August 1, 1973 and July 1, 1974, and automatically creating a new kind of coverage and increasing the insurer's financial liability by a sum up to $50,000 for each person able to make a claim for the payment of first party benefits—unconstitutionally impair the obligation of insurance contracts between insurers and insureds, in violation of Article I, Section 10, of the Constitution of the United States?

II.

Does Section 675(2) of the Insurance Law of the State of New York—requiring that ". . . [e]very insurer shall provide a claimant with the option of submitting any dispute involving the insurer's liability to pay first party benefits, the amount thereof or any other matter which may arise" concerning first party benefits "to binding arbitration . . ."—vest in a claimant the power to compel arbitration and thus to deprive an insurer of its constitutional

right to access to the courts in such disputes, thereby unconstitutionally violating the rights guaranteed to the insurer by the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

Parties

Appellant is a stock insurance corporation chartered by the Insurance Department of the State of New York on December 23, 1963. Since its inception, Appellant has been authorized to write automobile accident insurance in the State of New York, and has consistently done so. As an "insurer"—as defined generally in the Insurance Law of the State of New York, and particularly in Article XVIII thereof—Appellant is subject to said law, and to the jurisdiction of the Department of Insurance of the State of New York.

Appellee is the duly appointed Superintendent of Insurance of the State of New York, and is responsible for administering the Insurance Department of the State of New York.

Establishment of No-Fault

Section 1 of the Act of 1973 has created a new Article XVIII of the Insurance Law, commonly known as "No-Fault." No-Fault, generally speaking, requires all automobile insurance policies to include so-called "first party" coverage, designed to reimburse the insured, and others, for most losses (excluding death) "on account of personal

injury arising out of the use or operation of a motor vehicle in this state."[2] In due course, the Insurance Department promulgated regulations to implement the Act.

Compulsory Arbitration and Denial of Access to the Courts

Article XVIII, Section 675(1) (entitled "Fair claims settlement") provides that "[]payments of first party benefits shall be made as the loss is incurred," and Section 675(2)—one of the provisions challenged here—requires that "[e]very insurer shall provide a claimant[3] with the option of submitting any dispute involving the insurer's liability to pay first party benefits, the amount thereof or any other matter which may arise under subdivision one of this section to binding arbitration pursuant to simplified procedures to be promulgated or approved by the superintendent."

In other words, if a "claimant" exercises his or her option to compel arbitration, the insurer is absolutely prohibited for all time from obtaining a judicial determination on the merits as to every issue arbitrated.

2. This first party coverage does not insure against tort-type liability damages (which remain covered by the straight "liability" part of the policy), but rather covers "basic economic loss" (Section 675(1)). Perusal of the items constituting basic economic loss make it clear that the coverage is actually accident and health insurance, which Appellant never before wrote and which it has never been specifically licensed to write. (Although not directly involved in this action, No-Fault's other principal substantive provision barred recovery in tort for pain and suffering unless one had sustained a statutorily defined "serious injury.")

3. Under the statute "claimant" is not defined. However, since §675 provides that a claimant may claim "first party benefits," and since §671(2) provides that "first party benefits means payments to reimburse a person . . ." (emphasis added), it would appear that a "claimant" is any "person," without limitation.

Needless to say, neither New York's "Article 75" Arbitration Law nor its "Article 78" mandamus machinery afford the insurer judicial[4] recourse even remotely akin to that available if the insurer could take the first party benefit dispute into a trial court.[5] As a matter of fact, when insurers have sought Article 75 or 78 review, New York courts have not been bashful about admonishing them to keep away from the courts with complaints about claimants' elections to compel arbitration. As a matter of fact, Appellant itself was told in no uncertain terms by the New York County Supreme Court that:

> Since there is still a limited number of decisions interpreting Article XVIII of the Insurance Law, the court in this instance will not impose motion costs. However, in the future, counsel [i.e., the insurance companies] are put on notice that the court will seriously consider the imposition of motion costs where parties [insurance companies] institute proceedings of this nature without sound basis which tend to delay the arbitration to which the claimants are entitled and run counter to the clear intent of Legislature. *(Matter of Country-Wide Insurance Company (Tagle)*, NYLJ, 7/9/75, p. 13, col. 2 (Sup. Ct., NY Cty); see also, e.g., *Musolino* v. *American Consumer Ins. Co.*, 381 N.Y.S.2d 321 (App.Div., 2d Dep't., 1976).

4. It is an open question whether the compulsory arbitration provided for by Section 675(2) is in any way even judicial in nature. For example, the award need not be confirmed (11 NYCRR 65.7 (23)).

5. See, *e.g.*, *Maye* v. *Bluestein*, 40 N.Y.2d 113 (1976); *Lentine* v. *Fundaro*, 29 N.Y.2d 382, 383 (1972); *In the Matter of Shevell and Besen*, 29 A.D.2d 75; *Matter of Colletti* [Mesh], 23 A.D.2d 245, 248, aff'd 17 N.Y.2d 460 (1965); *Burt Building Material Corp.* v. *Int'l Brotherhood of Teamsters*, 18 N.Y.2d 556 (1966); *Bayridge Medical Group* v. *Health Insurance Plan*, 22 A.D.2d 807 (1964).

As to what issues must be arbitrated,[6] the statutory language itself suggests the answer: ". . . *any* . . . *matter* which may arise" concerning "first party benefits" (§675(2), emphasis added). Indeed, since the advent of No-Fault, consistent rulings of New York courts have made it quite clear that "any dispute" means just that, extending even to questions like whether a policy exists. There are a host of such decisions, far too many to cite here.

Appellant's experience with compulsory arbitration, pursuant to Sections 675(1) and 675(2) has not been a pleasant one.[7] In summary, there have been 150 arbitrations, at least twenty percent of which involved not Appellant's insureds, but third-party claimants. By the end of 1976, Appellant has had to pay in arbitration awards (excluding settlements) approximately $104,664.48, in American Arbitration Association administrative fees the sum of $16,000 (payable even if the claim is settled), and in "other expenses" (e.g., physicians' examination reports, stenotype reporters, arbitrators' fee) the sum of $10,226.95. In addition, virtually every arbitration was disposed of either by an award or by settlement. The fact is that once Appellant is compelled to arbitrate, it ends up paying.

6. The arbitrations have been conducted under the "New York State No-Fault Arbitration Rules of the American Arbitration Association" which were "Promulgated by the New York State Superintendent of Insurance effective February 1, 1974."

7. Appellant is apparently not the only insurer who has not done well in compulsory arbitration. Gerald Aksen, General Counsel of the American Arbitration Association writing in the *New York Law Journal* of May 14, 1975, reported that of the first "fifty-six hearings that went to final awards, in all but five, a sum of money was awarded the claimants. One of the five cases [where no award was made] . . . involved an acknowledged attempt at suicide by the applicant. The arbitrator denied the claim . . ." Apparently this is the sort of action by a claimant that is required before a claim will be denied.

As noted above, in addition to its constitutional challenge to Sections 675(1) and 675(2), Appellant also alleges the unconstitutionality of the Act's and the Insurance Law's extension of the formerly fixed-term policies and the substantial increase in the insurer's financial obligation.

Statutory Extension of Policies and Increase in Financial Liability

Section 11 of the Act had provided that although No-Fault itself would become effective on February 1, 1974, Section 7 of the Act would become effective six months earlier on August 1, 1973, "and . . . apply to policies of liability insurance written or renewed, or which have a renewal anniversary date on or after" August 1, 1973.

Since Section 7 had provided that "the named insured shall be entitled to renew such [automobile insurance] policy, upon payment of the premium due on the effective date of each renewal, for the three successive annual policy periods commencing at the first anniversary date of the policy on or after" August 1, 1973 and on or before July 31, 1974, the net effect was automatically to extend every existing automobile insurance policy (subject only to timely payment of the premium) which expired between August 1, 1973 and July 31, 1974. In other words, if between August 1, 1973 and July 31, 1974, a policy would ordinarily have expired which Appellant would have viewed as an unacceptable No-Fault risk, and thus ordinarily not have renewed, Section 7 of the Act, via Section 11, effectively barred Appellant from not renewing. Instead, the policy was automatically renewed (subject to cancellation

only for subsequent non-payment of the premium), for a year at a time, for up to three consecutive years.

Thereafter, in 1974, the life of such policies was again extended, this time by an amendment of Section 167-a of the Insurance Law, effective August 1, 1974, and applicable "to any policy issued or renewed as of such date or thereafter." The amendment provided that:

> (6) Notwithstanding any other provision of this section, the named insured under any policy insuring a motor vehicle which was renewed on or after August first, nineteen hundred seventy-three and on or before July thirty-first, nineteen hundred seventy-four shall be entitled to renew such policy, upon payment of the premium due on the effective date of each renewal, for three successive annual policy periods. . . .

The net result of the 1974 amendment of Section 167-a of the Insurance Law was automatically to extend for a period of up to three years (subject to cancellation only for subsequent non-payment of the premium), every automobile insurance policy that already had been automatically extended between August 1, 1973 and July 31, 1974, by Section 7 of the Act.

Thus, the net net effect of Section 7 of the Act, and of the 1974 amendment to Section 167-a of the Insurance Law, was automatically to extend for up to four years many automobile insurance policies which had been written by Appellant originally for only a one year term.

At its last session, the New York State Legislature extended these policies for an additional year, the Governor signed the bill, and it is now law.

Therefore, a combination of the Act, Section 167-a (6) of the Insurance Law and Chapter 348 of the Laws of 1976, have automatically extended for a period of at least four years most automobile insurance policies which otherwise would have expired originally between August 1, 1973 and July 31, 1974.[8]

But that is not all.

When the policies were extended, plaintiff's obligation was not only lengthened by at least four years, but the nature of its financial exposure and the amount thereof was increased almost incalculably, in the following manner. Prior to No-Fault, Section 167 (2-a) of the Insurance Law required insurance companies to provide minimum tort liability coverage of $10,000 per person, not to exceed $20,000 per accident. This meant, of course, that for the one-year life of the legally-required minimum automobile liability policy, the insurer's maximum tort liability exposure per policy, per accident, was no greater than $20,000. No-Fault, however changed all that. Sections 671 and 672 of Article XVIII added on top of the conventional "10/20" tort liability coverage (which remains), the entirely new accident and health type "first party" coverage, and in an amount "up to *fifty thousand dollars per person*" (§671(1), emphasis added). Since first party benefits run to the benefit of virtually everyone injured in an automobile acci-

8. Interestingly, although the avowed reason for extending the policies was in order to force the insurers to remain on the policies and write first party benefits for risks no longer acceptable, and thus to prevent new policies from coming into the assigned risk plan, all other existing coverage was also extended—which, of course, had nothing at all to do with the new scheme for first party benefits—with the result that insurers like appellant have been unable to cancel property damage coverage on which insureds are plainly submitting spurious claims.

dent, this means that the insurance company's exposure per accident for the payment of non-tort liability, accident and health type first party benefits runs up to $50,000 *each* for every person submitting a claim. Usually, one might believe that such exposure would embrace perhaps up to six passengers in the ordinary car ($300,000 maximum, plus the old "10/20" liability coverage, which remains), and perhaps a random pedestrian or two (another $100,000 maximum, plus the "10/20")—which, cumulatively, is quite substantial liability, especially when contrasted with the former "10/20" coverage alone. However, in Appellant's experience, a single accident has on more than one occasion given rise to as many as nine claims, thus pushing Appellant's maximum exposure on that one occurrence to $450,000 —one insured, one accident, yet, in addition to the former "10/20" tort liability exposure, up to $450,000 liability for accident and health type first party benefits.[9]

Appellant had written approximately 12,000 policies with expiration dates between August 1, 1973 and July 1, 1974, and thus subject to extension pursuant to Section 7 of Article XVIII and Section 167-a of the Insurance Law. The total amount of Appellant's potential tort liability on those policies, before the extension of the policies' time term and the increase in the nature of its liability exposure, was approximately $2,640,000,000.00. Availing themselves of the option provided by No-Fault—to "lock in" the policies' automatic renewal, merely by timely payment of the

9. One can only assume that since the advent of No-Fault this huge increase in the potential liability of automobile insurance companies means that most, if not all, are in violation of the Insurance Department's own requirements pertaining to the financial reserves each company must maintain.

premiums, and to include on top of the "10/20" tort liability the virtually unlimited new accident and health type "first party benefit" coverage—nearly every one of those 12,000 policies was renewed by Appellant's insureds. A recent search of only some of those 12,000 policies reveals that at least 1,200 of them would not have been renewed by Appellant if it had been free not to renew. On many of the policies, Appellant has already suffered substantial claim losses, and anticipates suffering still greater losses—on policies on which claims have already been made, and on those on which claims have not yet been made—until the end of the most recent one-year extension, and any additional extensions which may yet be forthcoming. Appellant's claim losses on these automatically extended accident and health type policies have been sustained as a result of virtually every kind of negligent act associated with driving: running red lights, yellow lights, and stop signs; hitting pedestrians, moving cars, parked cars, and even poles, while driving, rolling, skidding, turning, changing lanes, stopping, opening doors, and even while backing up.

Appellant's claims losses on these policies have been sustained as a result of the use of motor vehicles not only by Appellant's own insureds, but by persons to whom Appellant's insureds had loaned the car, including spouses, children, relatives, friends, and even comparative strangers. These losses have been sustained as a result of making payments to both individual claimants, and to multiple claimants in the same accident, ordinarily at least two, and sometimes as many as five. These losses have been sustained as a direct result of making payments for both personal injury and property damage, and as a result of having

to continue insuring persons who have been involved in as many as seven accidents during the original policy period and its statutory extensions.

As a result of the substantial damage to Appellant, done by the statutes referred to above, Appellant brought suit in the Southern District of New York (the amended complaint is annexed hereto as Appendix "A"), seeking a declaration of their unconstitutionality and an injunction against their enforcement. The single district judge granted Appellant's motion to convene a three-judge court (the single district judge's opinion/order is annexed hereto as Appendix "B"), and the three-judge court upheld the constitutionality of the statutes complained of.

The Questions Are Substantial

The Contract Clause

In the District Court New York conceded that its No-Fault statute extended for at least 4 years most 1-year automobile insurance policies which otherwise would have expired between August 1, 1973 and July 31, 1974, and that the statute also created a new kind of accident and health type insurance coverage and at the same time substantially increased the insurers' financial liability on those existing/extended policies. Thus, where the time term of the insurance policies has become four hundred percent longer than the insurers agreed to, and the policies' have been amended by operation of law to create a new type of coverage and their maximum financial obligation has been increased astronomically, a constitutional question arises under the Contract Clause—a constitutional question, we submit, not

yet expressly addressed by this Court, which is of the utmost public importance in view of the proliferation of No-Fault statutes throughout the country containing the same or closely comparable provisions.

Generally speaking, this Court's modern decisions under the Contract Clause seem to have fallen into three categories. One appears to consist of *de minimus* situations where if there was arguably an impairment, the legislature's tinkering was so negligible as to be deemed inconsequential. E.g. *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.*, 300 U.S. 124, 57 S.Ct. 338 (1937)). A second category begins with *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 54 S.Ct. 231 (1934), embracing decisions like *Veix* v. *Sixth Ward Building & Loan Ass'n of Newark*, 310 U.S. 32, 60 S.Ct. 792 (1940), *Faitoute Iron & Steel Co.* v. *City of Asbury Park*, 316 U.S. 502, 62 S.Ct. 1129 (1942), *East New York Savings Bank* v. *Hahn*, 326 U.S. 230, 66 S. Ct. 69 (1945), and apparently stands for the proposition that the Contract Clause must yield when the legislature is confronted with a substantial enough emergency. The third presents the non-*Blaisdell* side of the coin: cases beginning with *W. B. Worthen Co.* v. *Thomas*, 292 U.S. 426, 54 S.Ct. 816 (1934)—decided less than five months after *Blaisdell* and, like *Blaisdell*, authored by Chief Justice Hughes—and embracing decisions like *W. B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 55 S.Ct. 555 (1935), *State* v. *Brand*, 303 U.S. 95 (1938), *Wood* v. *Lovett*, 313 U.S. 362, 61 S.Ct. 983 (1941), where this Court found the Contract Clause to be a stronger value than the supposed emergencies which the various legislatures allegedly confronted.

Compared to the foregoing analysis must be the view, expressed by Justice Black in *El Paso* v. *Simmons,* 379 U.S. 497, 85 S.Ct. 577 (1965), that what really divides this Court's Contract Clause decisions is not an emergency/non-emergency rationale, but rather the intended and established distinction between an invalid impairment of a contract's *obligation* and a valid change in the *remedy*.

Under neither the Contract Clause's emergency/non-emergency analysis, nor its obligation/remedy analysis, has this Court ruled on a state's wholesale statutory rewriting of the two most important terms [duration and coverage] of virtually every automobile insurance policy then existing. Therefore, the Contract Clause aspect of this case's challenge to New York's No-Fault scheme presents two important separate but related issues for decisions: (1) does Contract Clause analysis turn on an emergency/non-emergency distinction, or on an obligation/remedy distinction [the three-judge court, from the cases it relied on, obviously thought the former], (2) if the former, was there a sufficient emergency confronting New York so as to justify overriding the Constitutional Contract clause guarantee [the three-judge court thought so, though it failed to say why, or to articulate the evidence it relied on], and, if the latter, was New York's extension of the time term and the financial liability, and creation of a new type of coverage, invalid impairment of the policies' obligation, or merely valid alteration of remedy?

As we stated above, and as this Court knows, No-Fault statutes are proliferating throughout the country, and before any more states decide to rewrite the essential terms

of existing insurance contracts, this Court should address the question of whether such statutory rewriting violates the Constitution's Contract Clause.

The No-Fault Claimant's Power to Prevent the Insurer from Suing

In the District Court, New York also conceded that its No-Fault statute allowed a claimant to completely cut-off an insurer from access to the courts as to all issues concerning first party benefits. In short, though the insurer cannot prevent the claimant from suing, the latter can prevent the former from suing merely by demanding compulsory binding arbitration.

Against this aspect of the No-Fault statutory scheme Appellant contended below that:

(1) this Court has held compulsory arbitration unconstitutional even where, unlike here, *both* parties were denied access to the courts and provisions existed for judicial review (see *Wolff Packing Co.* v. *Indust. Court* [*Wolff I*], 262 U.S. 525 (1923), *Dorchy* v. *Kansas,* 264 U.S. 286 (1924), *Wolff Packing Co.* v. *Indust. Court* [*Wolff II*], 267 U.S. 552 (1925);[10]

(2) in the only case where this Court held compulsory arbitration not unconstitutional (*Hardware Dealers' Mut. Fire Ins. Co.* v. *Glidden Co.,* 284 U.S. 151, 52 S.Ct. 69 (1931)), unlike here the power to deny access to the courts

10. See also *Amalgamated Ass'n etc.* v. *Wisconsin Employee Rel. Bd.,* 340 U.S. 383, 71 S.Ct. 359 (1951); *United Steelworkers of America* v. *U.S.,* 361 U.S. 76, 80 S.Ct. 1 (1959); *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.,* 363 U.S. 574, 80 S.Ct. 1347 (1960).

was not vested in only *one* party to the dispute, unlike here there was *no* preclusion of judicial review, and unlike here the statute there was very narrowly applicable to *only* the amount of liability; and

(3) in making it possible for a claimant to prevent an insurer from going to court, while allowing the claimant to sue if he/she wishes, New York's statute runs afoul of many cases in this Court, mostly rooted in the Fourteenth Amendment, at least implicitly recognizing the paramount importance of access to the courts in dispute resolution (see *Republic Steel Co.* v. *Maddox,* 379 U.S. 650, 85 S.Ct. 614 (1965); *Bernhardt* v. *Polygraphic Company of America,* 350 U.S. 198, 76 S.Ct. 273 (1956); *Boddie v. Connecticut,* 401 U.S. 371, 91 S.Ct. 780 (1971)).[11]

The three-judge court's response to these contentions provides some, but not all, of the reasons why the compulsory arbitration issue presented here is substantial.

The *Wolff* and *Dorchy* cases, the court below said, have been overruled *on the compulsory arbitration issue* by *Nebbia* v. *New York,* 291 U.S. 502 (1934), the three-judge court apparently believing that the compulsory arbitration schemes present in those cases had been invalidated on the basis of substantive due process principles.

Conceding that *Hardware Dealers'* was "[t]he only federal case presenting a due process analysis of compulsory arbitration of insurance claims," the three-judge court apparently equated constitutionally the "bi-lateralness"

11. It should be noted that Appellant was not complaining about being denied *free* access to the courts. Even though insurers are willing to pay appropriate fees, they are still denied access.

and the limited compulsory arbitration there with the "unilateralness" and the wholesale compulsory arbitration here, and attached no constitutional significance to the fact that the statutory scheme in *Hardware Dealers'* provided for substantial judicial review while No-Fault provides for none.

No constitutional violation of Appellant's right to use the courts was found, apparently on the basis of *U.S.* v. *Kras,* 409 U.S. 434 (1973) and *Ortwein* v. *Schwab,* 410 U.S. 656 (1976), despite the fact that in both cases, unlike here, would-be litigants sought not access to the courts, but *free access.*

Therefore, for a variety of reasons the compulsory arbitration question here is a substantial one. First, were the compulsory arbitration issues involved in *Wolff* (I and II) and *Dorchy* decided by substantive due process principles, and, regardless of whether they were or not, were the compulsory arbitration decisions there overruled by *Nebbia* or by any other case? Second, does *Hardware Dealers'* stand for the proposition that a No-Fault type of unilaterally induced compulsory arbitration, of all issues between disputants, with no judicial review available, is constitutional? Third, do *Boddie, Kras,* and *Ortwein* stand for the proposition that even if a would-be litigant is willing and able to pay the costs of access to the courts, it may be denied that access under a statute vesting the power to deny it in the adversary?

We respectfully suggest that these questions more than adequately demonstrate the substantiality of the issue to be reviewed here. Moreover, there is yet another point worth noting.

If Section 675(2) is upheld as constitutional, the following anomalous situation will soon arise. A "Section 675(2)" dispute in excess of $10,000 will arise between a New York insurer and an out-of-state claimant "involving the insurer's liability to pay first party benefits, the amount thereof or any other matter which may arise under" Section 675(1). Before (or perhaps even after) the claimant demands the compulsory "binding arbitration" provided in Section 675(2), the insurer, possessing at least 28 U.S.C. §1331 jurisdiction, will sue in the appropriate federal district court, seeking a declaratory judgment concerning the dispute. It would appear that the case would properly be in the district court, especially since:

> . . . the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions. The federal policy favoring jury trials is of historic and continuing strength. Parsons v. Bedford Breedlove & Robeson, 3 Pet. 433, 446-449 . . . Scott v. Neeley, 140 U.S. 106 . . .Byrd v. Blue Ridge Rural Electric Cooperative, Inc. 356 U.S. 525, 537-539 . . . Beacon Theaters, Inc. v. Westover, 359 U.S. 500 . . . Dairy Queen, Inc. v. Wood, 369 U.S. 469 . . . Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved. *(Simler* v. *Conner,* 372 U.S. 221, 222, 83 S.Ct. 609, 610 (1963)).

These principles mean that Section 675(2)—whatever it would mean if an insurer attempted to sue an unwilling claimant in a *New York* court on a Section 675(1)-675(2) dispute—cannot bar an insurer from a federal jury trial (assuming jurisdiction) with regard to such a dispute. If that is so, the anomaly is obvious, and can be taken even

further by supposing that both the state arbitration and the federal trial go forward to conclusions that are not identical. What then? And if the conclusions are identical, as for example where the insurer loses both the arbitration and the trial, does the state arbitration award bar the insurer's appeal to the federal Court of Appeals?

This anomaly arises, of course, because of the virtually unprecedented statute which New York has enacted, a statute which purports to pick and choose selectively among disputants those who may use our courts, and those who may not.

In spport of Appellant's contention that Section 675(2) presents a substantial constitutional question, it is possible to invoke the aid of even the architects of No-Fault, Professors Keeton and O'Connell, whose seminal book, *Basic Protection for the Traffic Victim,*[12] launched the No-Fault movement in the United States. They "recommended the preservation of the right to jury trial in tort cases for personal injury, and [their plan] also provide[d] for jury trial in actions for basic and added protection benefits if the amount in controversy is at least $5,000. . . . Thus we have declined to adopt for basic protection a system of adjudication by a board such as is used in most jurisdictions in relation to workmen's compensation claims" (at 440). Keeton and O'Connell's plan "precluded trial by jury in an action for basic protection benefits of less than $5,000 though allowing jury trial in other basic protection cases and in all the tort cases that are preserved" (at 483).

12. *Basic Protection for the Traffic Victim: A Blue-Print for Reforming Automobile Insurance,* Keeton and O'Connell (1965), Little, Brown & Co.

Even more significant is that *Basic Protection* contained an Appendix "A" which was entitled *"Separable Reforms"* (emphasis added). Subdivision 4 had this to say about arbitration:

> Even apart from constitutional considerations concerned with the right of jury trial, however, we have concluded that on principle we would not wish to recommend the compulsory substitution of arbitration for jury trials (at 527-8).

For all of the foregoing reasons, we are convinced that both the Contract Clause and uni-lateral compulsory arbitration questions presented by this appeal are substantial and that therefore this Court should note probable jurisdiction and set the case down for briefing and argument.

Respectfully submitted,

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APPENDICES

Appendix A

Amended Complaint

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

75 Civil 6271 (JEL) (TPG) (GLG)

COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

against

THOMAS A. HARNETT, Superintendent of Insurance of the State of New York,

Defendant.

By its attorney, HENRY MARK HOLZER, Plaintiff alleges:

PARTIES

1. Plaintiff COUNTRY-WIDE INSURANCE COMPANY, a stock insurance corporation chartered by the Insurance Department of the State of New York on December 23, 1963, is authorized to write, and does write, automobile accident insurance in the State of New York.

2. Plaintiff is an "insurer" as defined generally in the Insurance Law of the State of New York and particularly in Article XVIII thereof, and is thus subject to said law and to the jurisdiction of the Department of Insurance of the State of New York.

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3 Defendant THOMAS A. HARNETT is the duly appointed Superintendent of Insurance of the State of New York, and is responsible for administering the Insurance Department of the State of New York.

JURISDICTION

4. Jurisdiction is conferred on this court by 28 U.S.C. §§1331 and 1343.

STATUTES AND REGULATIONS

Generally

5. In 1973, the New York State Legislature enacted, and the Governor approved, "An Act To Amend the Insurance Law, the Workmen's Compensation Law and the Vehicle and Traffic Law, In Relation to Establishing A Comprehensive Automobile Insurance Reparations System." (L. 1973, c. 13; hereafter referred to as the "Act.") By its terms, the Act would become effective on February 1, 1974.

6. Section 1 of the Act created a new Article XVIII of the Insurance Law, commonly known as "No Fault." Generally speaking, "No Fault" required all automobile insurance policies to include so-called "first party" coverage, designed to reimburse the insured, and others, for most losses (excluding death) "on account of personal injury arising out of the use or operation of a motor vehicle in this state."[1]

1. Although not directly involved in this action, "No Fault" 's other principal substantive provision barred recovery in tort for pain and suffering unless one had sustained a statutorily defined "serious injury".

Appendix A

Compulsory Binding Arbitration

7. Section 675(1) of Article XVIII (entitled "Fair claims settlement") provides that "[p]ayments of first party benefits shall be made as the loss is incurred."

8. Section 675(2)—one of the provisions challenged constitutionally in this action—required that "[e]very insurer shall provide a *claimant* with the option of submitting any dispute involving the insurer's liability to pay first party benefits, the amount thereof or any other matter which may arise under subdivision one of this section to *binding arbitration* pursuant to simplified procedures to be promulgated or approved by the superintendent." (emphasis added).

9. On October 1, 1973, the Superintendent of the State of New York promulgated "Regulations Implementing the Comprehensive Automobile Insurance Reparations Act" (Regulation No. 68; 11 NYCRR 65). The Fourth Amendment to Regulation No. 68" (11 NYCRR §65.7), promulgated by the Superintendent on January 31, 1974, established the compulsory arbitration procedures contemplated by Section 675(2) of the Act. (A copy of the Fourth Amendment is annexed to the first (pre-amended) complaint herein as Exhibit "A".)[2][*]

2. On May 19, 1975, the Acting Superintendent promulgated the Seventh Amendment to Regulation 68, which dealt with the financing and costs of the compulsory arbitration system established by Section 675(2) of the Act. (A copy of the Seventh Amendment is annexed to the first (pre-amended) complaint herein as Exhibit "B".)

[*] The exhibits to the amended complaint are omitted.

10. From February 1, 1974, the date "No Fault" became effective, to and including the date of this complaint, at the behest of approximately 75 of its insureds and/or other claimants, Plaintiff has been forced by the compulsory arbitration requirement of Section 675(2), and the regulations promulgated thereunder by the New York State Insurance Department, to arbitrate before the American Arbitration Association approximately 85 disputes concerning liability to pay first party benefits, the amount thereof, and other matters arising under Section 675(1).[3] In addition, at the present time, Plaintiff has various similar arbitrations pending.

11. Many of these arbitrations have been held at the behest of, and/or involved, not Plaintiff's own insureds, but rather other claimants to whom, under "No Fault", first party benefits ran pursuant to Plaintiff's policies with its insureds, e.g. passengers, pedestrians.

12. Moreover, because of the well-known bias and institutionalized pre-disposition of A.A.A. arbitrators against insurance companies and in favor of "No Fault" claimants, it is not surprising that in virtually all the disputes which Plaintiff has been forced to arbitrate, pursuant to Section 675(2) of the Act, Plaintiff has not prevailed at more than a few—of all the arbitrations, Plaintiff has lost virtually every one.

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3. The arbitrations have been conducted under the "New York State No-Fault Arbitration Rules of the American Arbitration Association" which were "Promulgated by the New York State Superintendent of Insurance effective February 1, 1974." (A copy of these Rules are annexed to the first (pre-amended) complaint herein as Exhibit "C".)

13. As a result of these arbitrations, Plaintiff has already paid out approximately $200,000 in first party benefits. In addition, through August 31, 1976, A.A.A. administrative charges, room rentals, and other such A.A.A. required expenditures, cost Plaintiff approximately $16,000.00.

14. In addition to providing for compulsory binding arbitration—solely at the option of an insured or other claimant—concerning disputed first party benefit claims, and other matters arising under Section 675(1), the Act contained another provision which is challenged here.

Extension of Policies

15. Section 11 of the Act provided that although "No Fault" itself would become effective on February 1, 1974, Section 7 of the Act would become effective six months earlier on August 1, 1973, "and . . . apply to policies of liability insurance written or renewed, or which have a renewal anniversary date on or after" August 1, 1973.

16. Since Section 7 provided that "the named insured shall be entitled to renew such [automobile insurance] policy, upon payment of the premium due on the effective date of each renewal, for the three successive annual policy periods commencing at the first anniversary date of the policy on or after" August 1, 1973 and on or before July 31, 1974, the net effect was automatically to extend every existing automobile insurance policy (subject only to timely payment of the premium) which expired between August 1, 1973 and July 31, 1974. In other words, if between August

1, 1973 and July 31, 1974, a policy would ordinarily have expired which Plaintiff would have viewed as an unacceptable "No Fault" risk, and thus ordinarily not have renewed, Section 7 of the Act, via Section 11, effectively barred Plaintiff from not renewing. Instead, the policy was automatically renewed (subject to cancellation only for subsequent non-payment of the premium), for a year at a time, for up to three consecutive years.

17. Thereafter, in 1974, the life of such policies was again extended, this time by an amendment of Section 167-a of the Insurance Law, effective August 1, 1974, and applicable "to any policy issued or renewed as of such date or thereafter." The amendment provided that:

> (6) Notwithstanding any other provision of this section, the named insured under any policy insuring a motor vehicle which was renewed on or after August first, nineteen hundred seventy-three and on or before July thirty-first, nineteen hundred seventy-four shall be entitled to renew such policy, upon payment of the premium due on the effective date of each renewal, for three successive annual policy periods . . .

18. The net result of the 1974 amendment of Section 167-a of the Insurance Law was automatically to extend for a period of up to three years (subject to cancellation only for subsequent non-payment of the premium), every automobile insurance policy that already had been automatically extended between August 1, 1973 and July 31, 1974, by Section 7 of the Act.

19. Thus, the net effect of Section 7 of the Act, and of the 1974 amendment to Section 167-a of the Insurance

Law, was automatically to extend for up to four years many automobile insurance policies which had been written by Plaintiff originally for only a one year term. (In addition, the minimum coverage requirement was substantially increased.)

20. Plaintiff had written many such policies which were subject to extension pursuant to Section 7 of Article XVIII and Section 167-a of the Insurance Law. Indeed, Plaintiff had wirtten approximately 12,000 such policies, with expiration dates between August 1, 1973 and July 1, 1974, and the total amount of Plaintiff's potential liability on those policies was approximately $2,640,000,000.00. (Two Billion Six Hundred Forty Million Dollars)!

21. Availing themselves of the option provided by "No Fault"—to "lock in" the policies' automatic renewal merely by timely payment of the premiums—nearly every one of these 12,000 policies was renewed by Plaintiff's insureds.

22. A complicated and time-consuming manual search of some of these 12,000 policies reveals that at least 400 of them would not have been renewed by Plaintiff if it had been free not to renew.

23. On many such policies, Plaintiff has already suffered substantial claim losses, and Plaintiff anticipates suffering still greater losses on such policies—on both those on which claims have already been made and on those on which claims have not yet been made.

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24. Plaintiff's claims losses on such renewed policies have been sustained as a direct result of virtually every kind of negligent act: running red lights, yellow lights, and stop signs; hitting pedestrians, moving cars, parked cars, and even poles—while driving, rolling, skidding, turning, changing lanes, stopping, opening doors, and even while backing up.

25. Plaintiff's claims losses on such renewed policies have been sustained as a direct result of the use of motor vehicles not only by Plaintiff's own insureds, but by persons to whom Plaintiff's insureds had loaned the car: spouses, children, relatives, friends, and even comparative strangers.

26. Plaintiff's claims losses on such renewed policies have been sustained as a direct result of making payments to both single claimants, and to multiple claimants in the same accident, ordinarily at least two, and sometimes as many as five.

27. Plaintiff's claims losses on such renewed policies have been sustained as a direct result of making payments for both personal injury and property damage.

28. Plaintiff's claims losses on such renewed policies have been sustained as a direct result of having to continue insuring persons who have been involved in as many as seven accidents during the original policy period and its statutory extension(s).

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29. Although many examples can be shown of wholly undesirable policies which the statute automatically renewed, and which remained in effect thereafter only because Plaintiff's insureds made timely payments of the premiums, the following three epitomize Plaintiff's experience:

	Policy No.	*Date of Occurrence*	*Nature of Claim*
1.	2529	8/12/69	Struck rear of other car.
		11/ 2/71	Ran a stop sign.
		3/ 8/72	Towing loss.
		7/30/72	Struck rear of other car.
		8/18/72	Windshield damage.
		3/29/74	Struck a pole.
		1/ 6/75	Ran a stop sign.
2.	32305	6/20/70	Struck rear of other car.
		5/ 1/71	Sideswiped by other car.
		9/18/73	Struck by another car.
		8/17/74	Other car ran red light.
3.	24554	11/ 7/70	Windshield damage.
		1/30/72	Towing loss.
		6/ 8/72	Windshield damage.

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Policy No.	*Date of Occurrence*	*Nature of Claim*
	1/ 2/73	Windshield damage and towing loss.
	2/25/74	Struck rear of other car.
	3/11/74	Struck by another car.
	8/28/74	Backed into by another car.

Analysis of these policies reveals the consequences to Plaintiffs of their automatic extension. For example:

30. Policy 24554, originally written for one year, first became effective on September 14, 1969. It was voluntarily renewed by Plaintiff three times thereafter, but by January 2, 1973, Plaintiff had sustained four claims against the policy.[4] Although the policy would have expired on September 14, 1973—at which time Plaintiff would have declined to renew, because of the insured's claims history—as a result of the statutes complained of in this action, the policy was automatically extended. The first statutorily mandated extension ran from September 14, 1973 to September 14, 1974, during which period Plaintiff's insured was involved in three more reported accidents (all within six months of each other).[5] Because of Section 167-a(6), the second automatic extension of this policy—on which Plaintiff has *already* sustained *seven* claims—now has

4. November 7, 1970, January 30, 1972, June 8, 1972 and January 2, 1973.

5. February 25, 1974, March 11, 1974 and August 28, 1974.

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taken the policy from September 14, 1974 and given it life until September 14, 1977.

31. Policy 32305, originally written for one year, first became effective on March 22, 1970. It was voluntarily renewed by Plaintiff three times thereafter, but by September 18, 1973 Plaintiff had sustained three claims against the policy.[6] Although the policy would have expired on March 22, 1974—at which time Plaintiff would have declined to renew, because of its insured's claims history—as a result of the statutes complained of in this action, the policy was automatically extended. The first statutorily mandated extension ran from March 22, 1974 to March 22, 1975, during which period Plaintiff's insured was involved in still another accident.[7] Because of Section 167-a(6), the second automatic extension of this policy—on which Plaintiff has *already* sustained *four* claims—now has taken the policy from March 22, 1975 and stretched it out until March, 1978.

32. These two policies are unfortunately illustrative of a great many more. They represent instances in which Plaintiff has been forced by the statutes complained of in this action to remain legally bound for up to four additional years on insurance contracts—originally written for one year—which it no longer considers acceptable underwriting risks, and thus to suffer the substantial and potential financial liabilities incident to such insurance contracts. At its last session, New York's Legislature extended these policies for yet another year, the Governor signed the bill, and it is now law.

6. June 2, 1970, May 11, 1971 and September 18, 1973.

7. August 17, 1974.

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UNCONSTITUTIONALITY

33. By compelling Plaintiff, against its will to submit to compulsory binding arbitration of disputes with its insureds and other claimants concerning liability to pay first party benefits, the amount thereof, and other matters arising under Section 675(1), Section 675(2) of Article XVIII of the Insurance Law of the State of New York has violated Plaintiff's rights under the Seventh Amendment to the Constitution of the United States of America, the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States of America, and Article 1, Section 2 of the New York State Constitution.

34. By automatically extending for up to five additional years (subject to cancellation by Plaintiff only for subsequent non-payment of premium), policies which Plaintiff had originally written for only one year, Sections 7 and 11 of the Act, and Section 167-a(6) of the Insurance Law, have violated Plaintiff's rights under Article I, §10, cl. 1 of the Constitution of the United States of America, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States of America.

RELIEF SOUGHT

35. Plaintiff requests the following relief:

A. The convening of a three-judge court pursuant to 28 U.S.C. §§2281 and 2284.

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B. A permanent injunction from the three-judge court restraining the defendants' enforcement, operation or execution of Section 675(2) of Article XVIII of the Insurance Law, Sections 7 and 11 of the Act, and Section 167-a(6) of the Insurance Law.

C. A declaratory judgement from the three-judge court, pursuant to 28 U.S.C. §2201, that the said sections were and are unconstitutional as written and/or as applied.

D. The costs and disbursements of this action.

E. Such other relief as may be just.

HENRY MARK HOLZER
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Brooklyn, New York
September 1, 1976

Appendix B

Opinion of the United States District Court for the Southern District of New York Dated June 28, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6271 (GLG)

COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

against

THOMAS A. HARNETT, Superintendent of Insurance of the State of New York;
and INSURANCE DEPARTMENT OF THE STATE OF NEW YORK,

Defendants.

APPEARANCES:

HENRY MARK HOLZER, Esq.
Attorney for Plaintiff

LOUIS J. LEFKOWITZ, Esq.
Attorney General of the State of New York
Attorney for Defendants

By: Irving Galt, Esq.
Assistant Attorney General

Appendix B

GOETTEL, D.J.

The instant complaint[1] alleges, in a single cause of action, that certain provisions of New York's Comprehensive Automobile Insurance Reparations Act, Insurance Law, §670 *et seq.* [the "No-Fault Law"], violate the federal Constitution. Specifically, it is contended that §675.2, which provides for compulsory binding arbitration of certain disputes between the insurer and the claimant,[2] be conducted at the sole option of the claimant, violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment;[3] and, that §167-a(6) and related sections, providing for automatic renewals for several years of certain policies, subject to certain conditions, violates Article 1, section 10, clause 1, the Contract Clause, and the same Fourteenth Amendment provisions. The complaint seeks a declaration of unconstitutionality supported by injunctive relief.

The defendant moved to dismiss the action, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, arguing that there was a lack of subject matter jurisdiction and that the complaint failed to state a claim upon which relief could be granted. The plaintiff, in turn, requested that a

1 This action was initially filed in the Eastern District of New York. Venue was transferred to this Court by stipulation of the parties on December 16, 1975.

2 "Claimant" apparently includes insureds and persons making claims against the insured.

3 In addition plaintiff alleges a Seventh Amendment violation despite the fact that that Amendment does not apply to the states. *See Wartman* v. *Branch 7, Civ. D., Cty. Ct., Milwaukee Cty., Wis.*, 510 F.2d 130, 134 (7th Cir. 1975). Plaintiff's rights are collaterally protected under the penumbral effect of the Fourteenth Amendment claims.

three-judge panel be convoked in order to adjudicate these constitutional claims pursuant to 28 U.S.C. §2281.

The requirement that federal constitutional attacks on state statutes must be determined by a three-judge panel, rather than by a single judge, was intended to minimize interference by the federal judiciary into state matters. *See generally* 1A(2) Moore's Federal Practice ¶0.205. In *Goosby* v. *Osser,* 409 U.S. 512 (1973), the Supreme Court elaborated upon the judicial standard that "§2281 does not require the convening of a three-judge court when the constitutional attack upon the state statutes is *unsubstantial.*" *Id.* at 518 [emphasis added]. The Court defined "substantiality" in the following manner:

> "Constitutional insubstantiality" for this purpose has been equated with such concepts as "essentially fictitious," *Bailey* v. *Patterson,* 369 U.S., at 33; "wholly insubstantial," ibid.; "obviously frivolous," *Hannis Distilling Co.* v. *Baltimore,* 216 U.S. 285, 288 (1910); and "obviously without merit," *Ex parte Poresky,* 290 U.S. 30, 32 (1933). The limiting words "wholly" and "obviously" have cogent legal significance. *In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. §2281.* A claim is insubstantial only if " 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' " *Ex parte Poresky, supra,* at 32, quoting from *Hannis Distilling Co.* v. *Baltimore, supra,* at 288; see also *Levering & Garrigues Co.* v. *Morrin,* 289 U.S. 103, 105-106 (1933); *McGilvra* v. *Ross,* 215 U.S. 70, 80 (1909).

Id. [emphasis added]. The instant challenges must be evaluated against these guidelines.

The defendant proffers several judicial decisions which, it is argued, indicate that these claims are frivolous in accordance with the *Goosby* standard. The "decision" of the Supreme Court in *Gentile* v. *Altermatt,* 96 S.Ct. 763 (1976), dismissing an appeal from the Supreme Court of Connecticut upholding its No-Fault law, concerned a state law lacking any provisions similar to those presently under attack. *See Gentile* v. *Altermatt* —— Conn. ——, 37 (No. 6) Conn.L.J. 1 (Aug. 5, 1975). Connecticut's highest appellate court had opined:

> "had the legislature provided in the present case that, rather than abolish the cause of action . . ., factual issues in such instances are to be tried to a commissioner or the court without a jury, this would offend . . . [the state constitutional provisions for jury trials]. This constitutional prohibition . . . mandates that given a recognized cause of action to which the right to trial by jury attached prior to the existing constitution, the right to trial by jury must always be available in the trial of that cause. . . ."

Id. at 11 [citations omitted]. Thus, rather than support defendant's argument, reliance on *Gentile* serves to undercut it because the hypothetical suggested by the lower court above has become a reality under the No-Fault Law in New York. Under §675.2 the due process and equal protec-

tion rights of the insurer to a trial on the disputes in which it is involved is preempted by the exercise by the claimant of his option to submit those claims to binding arbitartion This arguably produces a violation of the United States Constitution.

Defendant's reliance on *Montgomery* v. *Daniels,* 38 N.Y.2d 41, 378 N.Y.S. 2d 1, 340 N.E. 2d 444 (1975), is also misplaced. In *Montgomery* the New York Court of Appeals decided that the No-Fault Law did not violate the New York and United States Constitutions. However, that attack came from claimant interests and the two issues now challenged were not raised at that time. Therefore, that decision is not binding even on the New York State courts.[4]

Defendant attempted to support its argument in favor of constitutionality with an analysis of federal due process and equal protection cases. This line of argument is inappropriate in that it impliedly concedes the existence of "substantiality" which requires that any determination on the merits be made by a three-judge panel. These "previous decisions that merely render [these] claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. §2281." *Goosby* v. *Osser, supra* at 518.

While it might seem that arbitration would be a preferable forum for an insurance company, rendering the constitutional claims immaterial, plaintiff has established that it has lost every one of the more than 40 matters taken to arbitration by claimants. It may be, therefore, that a valuable right has been taken from the plaintiff.

4 In the course of oral argument the defendant referred to a decision of a lower state court which allegedly rejected the constitutional claim now made against compulsory binding arbitration. *Green Bus Lines, Inc.* v. *Bailey,* 378 N.Y.S. 2d 648 (2d Dept. 1975). Since that was neither the opinion of the highest court in the state, nor was that issue squarely before that court (not having been raised at the trial level), and was mentioned only in passing in a Memorandum Decision, it provides little assistance now.

The constitutional questions regarding the validity of New York Insurance Law §675.2 are sufficient to require the convocation of the three-judge panel. Regarding automatic renewals (§167-a), however, the existence of "substantiality" is not so readily apparent, considering the extent to which insurance is regulated. *See* New York's Insurance Law, Articles VII, X, *et seq.,* whose constitutionality has been long established. The defendant has contended that if only one of these two bases is found to be substantial the other should be dismissed, since, in the defendant's opinion, the complaint is comprised of two separate and identifiable causes of action. This Court disagrees. The complaint can be interpreted as consisting of only one cause of action. See Fed. Rules Civ. Proc. rule 8(f). Accordingly, it would be inappropriate to grant defendant's request to sever the claims.

It is therefore ordered that the motion of the defendant to dismiss the complaint is denied pending decision by a three-judge court. The plaintiff's motion seeking the convocation of a three-judge panel pursuant to 28 U.S.C. §2284, to consider the constitutional issues, is granted.

So Ordered:

Dated: New York, N.Y.,
June 28, 1976.

/s/ Gerard L. Goettel

U.S. District Judge

Appendix C

Opinion of the United States District Court for the Southern District of New York Dated February 8, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6271 (GLG)

COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

against

THOMAS A. HARNETT, Superintendent of Insurance of the State of New York,

Defendant.

Before LUMBARD, Circuit Judge, and GRIESA and GOETTEL, District Judges.

APPEARANCES:

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By: Irving Galt, Esq.
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Of Counsel

Appendix C

GOETTEL, *D.J.*

Plaintiff, a New York insurance company issuing automobile accident insurance, seeks to have declared unconstitutional two portions of New York's "No-Fault" Insurance Law.[1] Plaintiff attacks the provision permitting compulsory binding arbitration of certain disputes at the demand of any claimant (N.Y. Ins. Law §675.2 (McKinney Supp. 1975)) and those requiring automatic renewal of the term of certain insurance policies.[2] It is claimed that to permit the invocation of the compulsory arbitration provision only at the option of the claimant violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States and the right to trial by jury found in Article 1, Section 2 of the New York State Constitution.[3] The policy renewal provision is said to violate the Contract Clause of the United States Constitution.[4]

New York's No-Fault Law was (and, perhaps, continues to be) the center of much controversy. Its con-

1 More formally known as the Comprehensive Automobile Insurance Reparations Act, N.Y. Ins. Law §670 *et seq.* (McKinney Supp. 1975), as added by 1973 N.Y. Laws, c. 13, effective February 1, 1974.

2 The statutes involved are Sections 7 and 11 of "An Act to Amend the Insurance Law, the Workmen's Compensation Law and the Vehicle and Traffic Law, In Relation to Establishing a Comprehensive Automobile Insurance Reparation System," 1973 N.Y. Laws, c.13, N.Y. Ins. Law §167-a(4) (McKinney Supp. 1975); N.Y. Ins. Law §167-a(6) (read in conjunction with N.Y. Ins. Law §675(1) (McKinney Supp. 1975)) amended by 1976 N.Y. laws, c.348 (McKinneys).

3 Plaintiff's original claim in this regard was made under the United States Constitution, Seventh and Fourteenth Amendments. The complaint was subsequently amended to add the state claims.

4. U.S. Const. Art I, §10.

stitutionality was challenged in the New York courts by claimant interests and was upheld by the New York Court of Appeals in *Montgomery* v. *Daniels,* 38 N.Y.2d 41, 378 N.Y.S.2d 1 (1975). The issues presented here were not passed upon and have not been authoritatively reviewed by the New York courts.[5] While there has been considerable litigation in other states concerning their No-Fault laws, with one case having been appealed to the Supreme Court of the United States,[6] these New York provisions appear unique and no decisions directly on point have been referred to the panel.

Plaintiff's principal argument with respect to the arbitration issue is that it is being deprived of its "right to access" to the courts. This argument derives primarily from the Supreme Court's decision in *Boddie* v. *Connecticut,* 401 U.S. 371 (1971). That case held that due process of law prohibited the State from denying indigents seeking divorces access to its courts simply because they could not pay court costs. While some of the language in the concurring opinions have broader implications (*see, e.g.,* 401 U.S. at 388, Brennan J. concurring), it is clear from the decision in *United States* v. *Kras,* 409 U.S. 434 (1973) that there is no basic constitutional right to litigate all

5 We are told they were raised in an appeal to the Second Department in 1975 in *Green Bus Lines* v. *Bailey,* 50 App. Div. 2d 924, 378 N.Y.S.2d 648 (1975). The Memorandum Decision, however, simply states that the court had considered certain constitutional issues not raised in the lower court and found them "to be of no substantial merit," citing *Montgomery* v. *Daniels, supra. Id.*

6 *Gentile* v. *Altermatt,* 423 U.S. 1041 (1976), dismissing an appeal from the Supreme Court of Connecticut which upheld its No-Fault Law.

disputes.[7] *See also Ortwein* v. *Schwab,* 410 U.S. 656 (1973).

Arbitration is a reasonable alternative to a judicial determination of insurance claims and, at least so long as no fundamental rights are involved, the state may choose to provide any rational method of dispute settlement that comports with the basic procedural safeguards required by due process. *Cf. Goldberg* v. *Kelly,* 394 U.S. 254, 266-71 (1970). New York's police powers are sufficient to justify compelling insurers to submit to binding arbitration. *Hardware Dealers Fire Ins. Co.* v. *Glidden Co.,* 284 U.S. 151, 158 (1931). One of the purposes of No-Fault legislation is to reduce the amount of litigation in the courts, and this provision serves that goal.[8] *Montgomery* v. *Daniels, supra* at 49-53.

Plaintiff relies on *Wolff Packing Co.* v. *Indus. Court,* 262 U.S. 522 (1923); *Dorchy* v. *Kansas,* 264 U.S. 286 (1924), and *Wolff Packing Co.* v. *Indus. Court,* 267 U.S. 552 (1925). These cases held that attempts to fix wages and compel arbitration were constitutionally impermissible because the industries there (*i.e.,* meat packing and coal mining) were not sufficiently "clothed with a public interest," to justify these regulations. This "public interest" standard was expressly rejected in *Nebbia* v. *New York,* 291 U.S. 502 (1934), where the Court substituted the broader test of "arbitrariness" concluding:

> "But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a

7 The case concerned the requirement for the payment of fees in order to file in bankruptcy. In its holding the Court emphasized the availability of alternative remedies. 409 U.S. at 445.

8 The statistics of the New York State Judicial Conference reflect an improvement in court backlogs since the passage of the No-Fault bill. 1974 Report of the N.Y. Judicial Conference §2.5.1.2 at 16.

> business in any of its aspects, including the prices to be charged for the products or commodities it sells." *Id.* at 537.

The Court has steadily rejected the substantive due process approach exemplified by *Wolf* and *Dorchy*, espousing a constitutional doctrine under which "the due process clause is no longer to be so broadly construed that . . . state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." *Lincoln Fed. Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 536-37 (1949).

The only federal case directly presenting a due process analysis of compulsory arbitration of insurance claims is *Hardware Dealers Fire Ins. Co.* v. *Glidden*, 284 U.S. 151 (1931). It clearly disposes of plaintiff's contentions concerning arbitration. The Minnesota statutory scheme required all state fire insurance policies to provide for compulsory binding arbitration of the amount of certain losses. The insurance company maintained that this infringed its rights under the Fourteenth Amendment. The Court rejected the challenge concluding:

> "The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure . . . . In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard." *Id.* at 158.

The Court noted that this procedure was comparable to other constitutionally permissible processes such as workmen's compensation proceedings where compensation is determined administratively, and such as "findings of fact by boards or commissions which . . . are [statutorily] made conclusive upon the courts if supported by evidence." *Id.* at 160.

The procedural safeguards of plaintiff's interests embodied in the New York State No-Fault Arbitration Rules include provision for adequate notice, hearing before an impartial decision-maker, presentation of evidence and witnesses who testify under oath, and the assistance of counsel. Arbitration awards are subject to judicial review and may be vacated or modified for any one of the several grounds set forth in N.Y.C.P.L.R. §7511 (McKinney 1963) (which deals with *voluntary* arbitration). Moreover, the New York Court of Appeals appears to have added another element to the judicial review authorized by N.Y.C.P.L.R. §7511. In *Mount St. Mary's Hosp.* v. *Catherwood*, 26 N.Y.2d 493, 311 N.Y.S.2d 863 (1970), involving *compulsory* arbitration, the court declared that due process required a further review of whether the award was supported by the evidence in the record. *Id.* at 508-10, 311 N.Y.S.2d 874-76. See also the Court of Appeal's recent decision in *Caso* v. *Coffey*, Nos. 542 & 543 (Ct. App., December 22, 1976). As the Supreme Court has stated, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrisey* v. *Brewer*, 408 U.S. 471, 481 (1972). The process afforded plaintiff clearly passes constitutional muster. *See, e.g., Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). The state police power may properly regulate

the insurance industry so long as there is a reasonable relationship between the regulation and protection against menaces to the health, safety and welfare of society. *See West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379, 391 (1937).

Perhaps the strongest element of plaintiff's position is the fact that only claimants, and not the insurance companies, may demand arbitration.[9] There is no legislative history explaining this distinction. It is generally thought however, that arbitration is speedier and less costly than litigation. *Wilko* v. *Swan,* 356 U.S. 427, 431-32 (1953). The claimant is seeking benefits and, therefore, desires speed while the carrier, normally, would not. Clearly, the positions of an individual claimant and the insurance carrier are unequal. And the carrier, of course, has a greater ability to bear the costs of litigation. There are, therefore, rational bases for the classification, which is all that is necessary. *City of New Orleans* v. *Dukes,* 96 S.Ct. 2513, 2516-17 (1976); *Goessaert* v. *Cleary,* 335 U.S. 464, 466-67 (1948). When dealing with parties in unequal positions, it is not unusual to give an arbitration versus litigation decision only to the weaker or aggrieved party. *See, e.g., Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974).[10]

The plaintiff also argues that it has been denied its right to jury trial under the New York Constitution, Ar-

9 Section 675(2) of the Insurance Law provides:

> "Every insurer shall provide a claimant with the option of submitting any dispute involving the insurer's liability to pay first party benefits, the amount thereof or any other matter which may arise under subdivision one of this section to binding arbitration pursuant to simplified procedures to be promulgated or approved by the superintendent."

10 This case held that arbitration of an employee's claim of racially discriminatory discharge did not bar a later court suit under the Civil Rights Act of 1964, 42 U.S.C.A. §2000e *et seq.* The employer, however, is restricted to the grievance arbitration process.

ticle 1, Section 2, which states in pertinent part: "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever." This issue is not free from doubt. Claims under insurance policies are, broadly speaking, contract claims as to which there has been a right to jury trial since 1777. New statutory compensation schemes that restricted the right to jury trial have been criticized by the New York courts. *Ives.* v. *South Buffalo,* 201 N.Y. 271 (1911).[11] However, recent cases have indicated that *Ives* may no longer be the law of New York. *See, e.g., Montgomery* v. *Daniels, supra* at 67.[12]

Defendant relies on *Montgomery* v. *Daniels, supra,* for the proposition that where the legislature has abolished a cause of action, there remains nothing to which the right of trial by jury may attach. However, the cause of action has not been abolished here, but merely modified, while retaining the claimants' right to jury trial. Of course, it could be argued that the right to benefits under No-Fault has become more equitable than contractual (in which case there is no right to jury) or that it amounts to a statutory rather than a common law claim. R. Keeton & J. O'Connell, "Basic Protection for the Traffic Victim" 498-504 (1965). Since this is a novel and important issue as to which the state law is evolving, it would appear that this court should exercise its discretion to refuse to decide this pendant issue of state law. *Hagans* v. *Lavine,* 415 U.S. 528, 545-50

11 This case involved the State's then new Workmen's Compensation Act. The Act was found unconstitutional on other grounds.

12. The Court of Appeals stated that "In our view *Ives* would not be similarly decided by our court today." *Montgomery* v. *Daniels,* 38 N.Y.2d at 67, 378 N.Y.S.2d at 24 (1975).

(1974). As the Supreme Court observed recently, in a related context, in *Bellotti* v. *Baird,* 96 S.Ct. 2857, 2866 (1976):

> "[A]bstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.' *Harrison* v. *NAACP,* 360 U.S. 167, 177 (1959)."

Finally, we have plaintiff's attack on the provisions which require automatic renewal of most automobile insurance policies for specified periods,[13] as violative of the Contract Clause, U.S. Const. Art. I, §10, cl. 1.

We are told that the legislature first extended the life of the policies in order to ensure continuance of an orderly market during the early years of No-Fault.[14] This extension of the automatic renewal feature was repeated in 1976. The 1976 extension stemmed from the same considerations, specifically, to avoid dumping vast numbers of insureds from the voluntary market with a consequent doubling of the number of insureds in the assigned risk pool.[15] The adverse impact on the plaintiff of the renewals and the enforced retention of "high risk" insureds is heightened by the fact that No-Fault increased the financial liability

13 See note 2 *supra.*

14 Memorandum of the State of New York Insurance Department No. 17 (May 19, 1976) at 3.

15 See note 14 *supra.* The parties differ on the construction of the renewal provisions—whether they provide for a total of four or five years of extensions. For determination of the issue before us we think it makes no difference.

of insurers from a minimum requirement of $20,000 per accident to $50,000 per claimant for first party benefits.

The public need for these extensions has been sufficiently demonstrated. Regulation of the insurance industry, in order to provide adequate protection of the public, is surely a proper subject for the state's exercise of its police power. *California State Auto. Ass'n.* v. *Maloney,* 341 U.S. 105, 109-110 (1950); *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden, supra* at 157-158. The same public interests which justified the imposition of the entire No-Fault scheme support this aspect of the statutory framework. *Montgomery* v. *Daniels, supra.* The law accomplishes a legitimate public goal and any contract right must yield to it. *Veix* v. *Sixth Ward Bldg. & Loan Ass'n.,* 310 U.S. 32, 41 (1940); *Home Bldg. & Loan Ass'n.* v. *Blaisdell,* 290 U.S. 398, 437 (1934); *Marcus Brown Holding Co.* v. *Feldman,* 256 U.S. 170 (1921).

In conclusion, therefore, the amended complaint must be dismissed. This, of course, is without prejudice to the institution of a state court action pursuing the state claim.

Dated: New York, N.Y.,
February 8, 1977.

/s/ J. Edward Lumbard

J. Edward Lumbard
United States Circuit Judge

/s/ Thomas P. Griesa

Thomas P. Griesa
United States District Judge

/s/ Gerard L. Goettel

Gerard L. Goettel
United States District Judge

Appendix D

Judgment of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6271 (GLG)

COUNTRY-WIDE INSURANCE COMPANY,
Plaintiff,

against

THOMAS A. HARNETT, Superintendent of Insurance of the State of New York,
Defendant.

A Statutory Court hearing having been held before the Hon. J. Edward Lumbard, C.J., and Hon. Thomas P. Griesa, U.S.D.J., and Hon. Gerard L. Goettel, U.S.D.J., and the Court thereafter on February 9, 1977, having handed down its opinion in favor of the defendant, it is,

ORDERED, ADJUDGED and DECREED: That the amended complaint be and it is hereby dismissed. This, of course, is without prejudice to the institution of a state court action pursuing the state claim.

Dated: New York, N.Y.
February 14, 1977

/s/ RAYMOND F. BURGHARDT
Clerk

Appendix E

Notice of Appeal to the Supreme Court of the United States

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 6271 (GLG)

COUNTRY-WIDE INSURANCE COMPANY,
Plaintiff-Appellant,

against

THOMAS A. HARNETT, Superintendent of Insurance of the State of New York,
Defendant-Appellee.

Notice is hereby given that the Plaintiff-Appellant hereby appeals to the Supreme Court of the United States from the judgment in this action dated and filed on February 14, 1977, dismissing the amended complaint.

This appeal is taken pursuant to 28 U.S.C. §1253.

New York, New York, February 28, 1977

/s/ HENRY MARK HOLZER

HENRY MARK HOLZER (P.C.)
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To: Clerk of the above-named court

Louis J. Lefkowitz, Esq.
Attorney General, State of New York

IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1386

COUNTRY-WIDE INSURANCE COMPANY,

Appellant,

against

THOMAS A. HARNETT, Superintendent of Insurance of the State of New York,

Appellee.

On Appeal from the United States District Court for the Southern District of New York

MOTION TO DISMISS OR AFFIRM

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On Appeal from the United States District Court for the Southern District of New York

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MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Rules of this Court, moves to dismiss or affirm on the grounds that the questions raised on this appeal are so insubstantial as not to warrant argument, and the decision below is so obviously correct as to warrant no further review.

Statement of the Case

This action was brought under 28 U.S.C. §§ 1331 and 1343 by appellant, a New York insurer, for a declaration of unconstitutionality and an injunction with respect to two features of New York's No-Fault Act (N.Y. Insur.

Law Art. 18, §§ 670 *et seq.*, as added by L. 1973, c. 13, effective Feb. 1, 1974). In unanimously dismissing the amended complaint, the three-judge District Court expressed the view (J.S. 22a) that these particular facets had not been passed upon or authoritatively reviewed by the New York courts, including the State's highest court in previously upholding the constitutionality of the Act itself in *Montgomery* v. *Daniels,* 38 NY 2d 41, 340 NE 2d 444, 378 N.Y.S.2d 1 (1975).*

The holding below was predicated on the law, without need of resolving any possible issues of fact. Nevertheless, we feel bound to take exception to some, at least, of the plethora of misleading statistics and assumptions of fact and law set forth in much of appellant's statement of the case.

Thus, for example, appellant claims that through the exercise of a claimant's option to compel arbitration (N.Y. Insur. L. § 675[2]), "the insurer is absolutely prohibited for all time from obtaining a judicial determination on the merits as to every issue" (J.S. 6).

New York's arbitration statute, Civil Practice Law and Rules Art. 75, provides four grounds for vacating awards on the application of a participant whose rights were prejudiced.** Once the award has been vacated, "the court may

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*No appeal to this Court was sought to be taken in *Montgomery,* as was unsuccessfully attempted with respect to Connecticut's substantially similar no-fault law found constitutional in *Gentile* v. *Altermatt,* 169 Conn. 267, 363 A2d 1 (1975), *app. dism.* 423 U.S. 1041. We believe the holdings in *Montgomery* and *Gentile* are dispositive of appellant's contentions in this case.

**"The award shall be vacated . . . if the court finds that the rights of that party were prejudiced by: (i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that

(footnote continued on the following page)

order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator . . ." CPLR § 7511(d).

As noted below (J.S. 25a), this statutory protection has been broadened, with respect to *compulsory* arbitration, by case law holding that CPLR § 7511(b),

> "in authorizing review of whether the arbitrator has exceeded his power, by necessary logical extension and without distortion of its literal terms includes review in the case of compulsory arbitration (but only in such case) of whether the award is supported by evidence or other basis in reason, as may be appropriate and appearing in the record." *Mt. St. Mary's Hospital* v. *Catherwood,* 26 N Y 2d 493, 508, 260 NE 2d 508, 516-17, 311 N.Y.S.2d 863, 875 (1970). See also *Caso* v. *Coffey,* 41 N Y 2d 153, 359 NE2d 683 (1976).

Appellant asserts that "if the insurer could take the first party benefit dispute into a trial court," rather than go to arbitration, there might be a different type of "judicial recourse" (J.S. 7). While this may be literally true, it raises no constitutional question, for it does not imply that there was not a "reasonable basis" for the Legislature's decision to permit first party benefit claims, newly created by the Act, to be referred to a forum other than the courts. As was said in *Hardware Dealers Fire Ins. Co.* v. *Glidden,* 284 U.S. 151, 158 (1931):

> ". . . the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The Fourteenth Amendment neither implies that all trials must be by jury, nor

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(footnote continued from preceding page)

a final and definite award upon the subject matter submitted was not made; or (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection." CPLR § 7511(b)(1).

> guarantees any particular form or method of state procedure . . . [A] state may choose the remedy best adapted, . . . provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard."

The three-judge court pointed out that *Hardware Dealers, supra,* a case "directly presenting a due process analysis of compulsory arbitration of insurance claims . . . clearly disposes of [appellant's] contentions concerning arbitration" (J.S. 24a). Indeed, appellant does not even argue that arbitration denies it reasonable notice or opportunity to be heard.

Appellant complains of having been admonished by the New York County Supreme Court to "keep away from the courts with complaints about claimants' elections to compel arbitration" (J.S. 7). Yet, as shown by appellant's quoted excerpt (*ibid.*), the court merely chided the insurer for instituting "proceedings of this nature *without sound basis*" (emphasis supplied). As we have already noted (*ante,* p. 3), the State's highest court has indicated on at least two occasions the substantial degree of review available with respect to compulsory arbitration.

In detailing its asserted arbitration expenses (J.S. 8), appellant seeks undeserved sympathy when its own figures could just as well be interpreted as showing that the insurer has benefited from arbitration. Appellant states it has been party to 150 arbitrations, resulting in awards of approximately $105,000 (excluding settlements) plus fees of $16,000 to the American Arbitration Association, and some $10,000 in "other expenses." Thus each award cost it an average of only $700, plus expenses. The expenses ostensibly average out to $248 per case, but are actually much less, for they also include the expenses of settlements, so that the total cost per case in which an award was made was well under $950. Clearly, therefore, appellant's 150

arbitrated claims could not have caused benefits to even approach, on the average, the pre-No-Fault "10/20 coverage"; and the claim of financial harm is not only immaterial, but grossly exaggerated.

The portrayal of "substantial claim losses" because of a claimed potential liability of up to $450,000 per accident (J.S. 12-13) is ludicrous. Appellant's own figures demonstrate that its payments under compulsory arbitration, including awards and expenses, must have been less than $50,000 per year on *all* of its policies, for the three years since No-Fault took effect.

Of the insurer's 12,000 policies which it says came unde. the mandatory extension provisions of the Act, appellant speculates that 1,200 of them would not otherwise have been renewed. Cancellation of those 1,200 policies would not have meant a complete end to the insurer's liability for the alleged bad risks. Those same insureds would have been obliged to obtain coverage under the assigned risk plan, to which the insurer contributes. In addition, appellant would have borne a part of the cost of every other company's rejected risks relegated to assigned risk coverage, N.Y. Insurance Law § 63. Thus, appellant has actually reaped a benefit by not having to share the cost of the impliedly bad risk policies that other companies might have cancelled.

ARGUMENT

The decision of the three-judge court was manifestly correct and presents no substantial question for determination by this Court.

A.

The contract impairment claim, U.S. Const. Art. 1, § 10, stemming from the provisions of §§ 7 and 11 of the Act (N.Y. Laws 1973, c. 13) and N.Y. Insurance Law § 167-a requiring the extension of certain policies, is patently in-

substantial. It received short shrift, and rightly so, at the hands of the three-judge court, J.S. 28a-29a.

It is virtually a truism that the State's right to protect the general welfare of the people by exercise of the police power is paramount to any rights under contract notwithstanding the prohibition in Article 1, § 10, against impairment of the obligations of contracts. *Home Bldg. Loan Assn.* v. *Blaisdell,* 290 U.S. 398 (1934); *Faitoute Co.* v. *Asbury Park,* 316 U.S. 502 (1942); *East New York Savings Bank* v. *Hahn,* 326 U.S. 230 (1945), affg. 293 N.Y. 622; *Manigault* v. *Springs,* 199 U.S. 473 (1905); *Jamaica Savings Bank* v. *Lefkowitz,* 390 F. Supp. 1357 (E.D.N.Y. 1975), aff'd 423 U.S. 802 (1975). The insurance industry is one peculiarly amenable to close state regulation in the exercise of the police power, *e.g., California State Auto Assn.* v. *Maloney,* 341 U.S. 105, 109-10 (1951); *Osborn* v. *Ozlin,* 310 U.S. 53, 65-66 (1940); *Hardware Dealers Mutual F.I. Co.* v. *Glidden Co., supra* (284 U.S. at 157-58), as has been held specifically with regard to no-fault legislation, *Montgomery* v. *Daniels,* 38 N Y 2d 41, 54-6, 340 NE 2d 444, 452, 453 (1975); *Gentile* v. *Altermatt,* 169 Conn. 267, 363 A 2d 1, 18 (1975), app. dism. 423 U.S. 1041 (1976). Indeed, with respect to the insurance industry, the state power is "broad enough to take over the whole business, leaving no part for private enterprise", *Calif. State Auto Assn.* v. *Maloney, supra* (341 U.S. at 110).

As against the exercise of the state police power, coupled with the powerful presumption of constitutionality, the claim of contract impairment simply evaporates.

Considerations such as those indicated in the opinion below (J.S. 28a-29a) support the legislative action in the exercise of the state police power and as a matter of the Legislature's choice and discretion as to the means best adapted to secure the benefits intended. See, *e.g., East New York Savings Bank* v. *Hahn, supra; Home Bldg. & Loan Assn.* v. *Blaisdell, supra.* In the words of the three-judge court which dismissed the instant complaint (J.S. 29a):

> "Regulation of the insurance industry, in order to provide adequate protection of the public, is surely a proper subject for the state's exercise of its police power . . . The law accomplishes a legitimate public goal and any contract right must yield to it."

B.

In attacking the arbitration provisions of N.Y. Insurance Law § 675(2), appellant relies principally on the argument that it is being deprived of a supposed fundamental, independent right "to access to the courts," in violation of the Fourteenth Amendment.

The reliance is misplaced; in the no-fault context, the argument has been rejected not only by the court below, J.S. 22a-23a, but previously by the New York Court of Appeals in a carefully considered opinion, *Montgomery* v. *Daniels, supra,* where it was pointed out that (38 N Y 2d at 60)

> "reliance on *Boddie* v. *Connecticut* (401 U.S. 371) . . . is misplaced. In *Boddie* and in subsequent cases clarifying *Boddie* (e.g., *Ortwein* v. *Schwab,* 410 U.S. 656; *United States* v. *Kras,* 409 U.S. 434) the Supreme Court has made it clear that *access to the courts in and of itself is not an independent constitutional right.* The right to access to the courts will be accorded special constitutional protection only where the right sought to be asserted through such access is a right recognized in the constitutional sense as carrying a preferred status and so entitled to special protection and then only where there is no alternative forum in which vindication of that constitutionality protected right may be sought. . . ." (emphasis supplied.)

So, too, appellant seeks to disinter the long-since abandoned doctrines of *Wolff Packing Co.* v. *Indus. Court,* 262 U.S. 522 (1923) and 267 U.S. 552 (1925), and *Dorchy* v. *Kansas,* 264 U.S. 286 (1924).

As the court below indicated (J.S. 23a), the "public interest" standard of the *Wolff* duo and *Dorchy* "was expressly rejected in *Nebbia* v. *New York,* 291 U.S. 502 (1934)." The Court went on to explain that *Lincoln Fed. Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U.S. 525 (1949), exemplifies the rejection of the substantive due process approach of *Wolff* and *Dorchy* (J.S. 24a).

The New York Court of Appeals had expressed the same view in a compulsory arbitration case, *Mt. St. Mary's Hospital, supra* (26 N Y 2d at 500):

> "The underpinnings for the view [of the *Wolff-Dorchy* cases] concerning industries affected with a public interest have, of course, since then been severely, if not fatally, weakened (see *Lincoln Union* v. *Northwestern Co.,* 335 U.S. 525, 535-37)."

Equally futile is appellant's attempt to maintain that *Hardware Dealers Fire Ins. Co.* v. *Glidden, supra* (284 U.S. 151), has no authoritative application to this case. Although *Hardware Dealers* upheld the constitutionality of a statute which permitted determination by compulsory arbitration only of the amount of loss "reserving all other issues for trial in court" (284 U.S. at 159), the case laid down broad guidelines that would also validate a more comprehensive arbitration scheme (such as provided by the No-Fault Act). Thus, it held that "the state may choose the remedy best adapted to protect the interests concerned . . .," and that "the requirements of the Fourteenth Amendment . . . are satisfied if the substitute is substantial and efficient" (284 U.S. at 158, 159).

In *Montgomery, supra,* the court rejected the argument that New York's No-Fault Act unconstitutionally abro-

gates, in part, the common law right to sue in tort without providing an "adequate substitute remedy," declaring (38 N Y 2d at 58):

> ". . . we would conclude that the issue is not present because under any analysis the law now challenged provides an adequate substitute for the cause of action it abrogates."

CONCLUSION

The appeal should be dismissed or the judgment affirmed.

Dated: New York, New York
May 5, 1977

Respectfully submitted,

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